Supreme Court, U.S.
FILED
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No. 02-599

IN THE SUPREME COURT OF THE UNITED STATES

SHEILA FOSTER ANTHONY
AND LISA FOSTER MOODY,
Petitioners,

v.

ALLAN J. FAVISH, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In his response to the Foster family's petition for certiorari and in his petition for certiorari on behalf of the Office of Independent Counsel (No. 02-954), the Solicitor General rightly contends that the Ninth Circuit Court of Appeals decisions in this case conflict with decisions of this Court and other Circuits as to important issues regarding Exemption 7(C) of the Freedom of Information Act (5 U.S.C. § 552) ("FOIA"). However, the Solicitor General takes two positions with which we disagree.

1. The Solicitor General asks that the petitions for certiorari be held pending this Court's decision in *United States Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms v. City of Chicago*, No. 02-322 ("*ATF*"). We address this issue in our response to the Solicitor General's petition in No. 02-954, observing that *ATF* presents very different issues regarding the public interest aspect of FOIA Exemption 7(C) and does not concern in any way the issue of defining the scope of survivors' privacy rights presented in our petition.

2. The Solicitor General also argues that the court of appeals' decision contained no holding with respect to the scope of survivors' privacy rights and thus does not warrant review on that ground.[1] But the district court's decision was based on its interpretation of the court of appeals' previous

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[1] The Solicitor General previously took a different view of the Ninth Circuit's decision. In his Applications for a Further Extension of Time Within Which to File a Petition for A Writ of Certiorari, filed November 14 and December 17, 2002, the Solicitor General stated (at p. 5) that "by limiting the protected privacy interest to photographs that are 'graphic, explicit and extremely upsetting,' the court [of appeals] skewed the balance of interests against legitimate privacy interests."

decision as having "defined the zone of privacy protection as those photographs that are 'graphic, explicit, and extremely upsetting.'" Petition App. at 5; Brief for the Federal Respondent (No. 02-599) at 6. The court of appeals summarily affirmed the district court's judgment ordering release of four photographs, despite arguments by intervenors and the government that the court of appeals' previous decision had not adopted the test the district court applied.[2] In these circumstances, it is difficult to understand the court of appeals' decision other than to say that, if the "graphic, explicit, and extremely upsetting" test is not met, there is no recognizable survivors' privacy interest. As discussed previously,[3] the Ninth Circuit's position on this important issue (which likely will reoccur with increasing frequency) is contrary to that taken by the First, Third, Fifth, Sixth, Seventh, Tenth and D.C. Circuits, and also is at odds with this Court's decisions in *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989), and *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982).

In any event, if the Court takes this case solely on the basis of the public interest issues, its decision may have no effect on the outcome. If, as the Ninth Circuit has apparently concluded, no privacy interest is implicated by the photographs it ordered to be released, it will not have to reach the public interest issues on remand. This is so because whether there is a public interest supporting disclosure of law enforcement records becomes relevant only

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[2] Opening Brief of Defendant-Appellee/Cross-Appellant, filed September 12, 2001, in Nos. 01-55487, 01-55788 and 01-55789, at pp. 18-19; Opening/Answering Brief of Defendants-In-Intervention, filed September 19, 2001 at pp. 13-14 ("serious misinterpretation of the Remand Order").

[3] Petition at 15-17.

where some privacy interest is invaded. 5 U.S.C. § 552 (b)(7)(C). If no privacy interest is invaded and no other exemption applies, the records must be released. *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136 (1989); *United States Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988). Consequently, resolution of the public interest issues, as urged by the Solicitor General as well as the Foster family, ultimately will require consideration of the survivor privacy issue.

CONCLUSION

The petition for a writ of certiorari should be granted as to all issues, rather than held.

Respectfully submitted,

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